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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 GREGORY S. RIDEAU, JR.,
12 Plaintiff,

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14 vs.
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16 GERALD J. JANDA, et al.,
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18 Defendants.
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Civil No. 13cv0609 MMA (KSC)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS***

[ECF No. 2];

AND

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT TO
28 U.S.C. § 1915(e)(2)**

21 Gregory Rideau (“Plaintiff”), a state inmate currently housed at the California State
22 Prison - Los Angeles County, and proceeding pro se, has filed this civil action pursuant
23 to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C.
24 § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant
25 to 28 U.S.C. § 1915(a) [ECF No. 2].

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1 **I.**

2 **MOTION TO PROCEED IFP**

3 All parties instituting any civil action, suit or proceeding in a district court of the
4 United States, except an application for writ of habeas corpus, must pay a filing fee of
5 \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to
6 prepay the entire fee only if the plaintiff is granted leave to proceed IFP pursuant to 28
7 U.S.C. § 1915(a). As defined by the PLRA, a "prisoner" is "any person incarcerated or
8 detained in any facility who is accused of, convicted of, sentenced for, or adjudicated
9 delinquent for, violations of criminal law or the terms and conditions of parole, probation,
10 pretrial release, or diversionary program." 28 U.S.C. § 1915(h). Because Plaintiff is
11 currently incarcerated, he is a prisoner as defined by 28 U.S.C. § 1915(h), and therefore
12 subject to the PLRA's requirements and limitations.

13 Plaintiff has submitted a certified copy of his trust account statement pursuant to
14 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. The Court GRANTS Plaintiff's
15 Motion to Proceed IFP (ECF No. 2), and assesses no initial partial filing fee per 28
16 U.S.C. § 1915(b)(1). However, the entire \$350 balance of the filing fees mandated shall
17 be collected and forwarded to the Clerk of the Court pursuant to the installment payment
18 provisions set forth in 28 U.S.C. § 1915(b)(1).

19 **II.**

20 **SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

21 The PLRA also obligates the Court to review complaints filed by all persons
22 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any
23 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
24 criminal law or the terms or conditions of parole, probation, pretrial release, or
25 diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C. §§
26 1915(e)(2) and 1915A(b). Under these provisions of the PLRA, the Court must sua
27 sponte dismiss complaints, or any portions thereof, which are frivolous, malicious, fail
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1 to state a claim, or which seek damages from defendants who are immune. *See* 28 U.S.C.
2 §§ 1915(e)(2)(B) and 1915A.

3 “[W]hen determining whether a complaint states a claim, a court must accept as
4 true all allegations of material fact and must construe those facts in the light most
5 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also*
6 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2)
7 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts
8 “have an obligation where the petitioner is pro se, particularly in civil rights cases, to
9 construe the pleadings liberally and to afford the petitioner the benefit of any doubt.”
10 *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773
11 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential
12 elements of claims that were not initially pled.” *Ivey v. Board of Regents of the*
13 *University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982). “Vague and conclusory
14 allegations of official participation in civil rights violations are not sufficient to withstand
15 a motion to dismiss.” *Id.*

16 Here, Plaintiff claims that his constitutional rights were violated when prison
17 officials at Centinela State Prison applied funds that Plaintiff received from a settlement
18 to the restitution amount he owed. Plaintiff seeks recovery of these funds. (*See* Compl.
19 at 11.) However, where a Plaintiff alleges the deprivation of a liberty or property interest
20 caused by the unauthorized negligent or intentional action of an official, the Plaintiff
21 cannot state a constitutional claim where the state provides an adequate post-deprivation
22 remedy. *See Zinermon v. Burch*, 494 U.S. 113, 129-32 (1990); *Hudson v. Palmer*, 468
23 U.S. 517, 533 (1984). The California Tort Claims Act (“CTCA”) provides an adequate
24 post-deprivation state remedy for the random and unauthorized taking of property.
25 *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Thus, Plaintiff has an adequate
26 state post-deprivation remedy and his claims relating to the loss of his property are not
27 cognizable in this § 1983 action, and must be dismissed pursuant to 28 U.S.C.
28 §§ 1915(e)(2).

1 Accordingly, the Court must DISMISS Plaintiff's Complaint for the reason set
2 forth above but will provide Plaintiff with the opportunity to amend his Complaint to
3 correct the deficiencies of pleading identified by the Court.

4 **III.**

5 **CONCLUSION AND ORDER**

6 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

7 1. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) (ECF No.
8 2) is **GRANTED**.

9 2. The Secretary of California Department of Corrections and Rehabilitation,
10 or his designee, shall collect from Plaintiff's prison trust account the \$350 balance of the
11 filing fee owed in this case by collecting monthly payments from the account in an
12 amount equal to twenty percent (20%) of the preceding month's income and forward
13 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
14 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
15 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

16 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
17 Beard, Secretary, California Department of Corrections and Rehabilitation, 1515 S Street,
18 Suite 502, Sacramento, California 95814.

19 **IT IS FURTHER ORDERED** that:

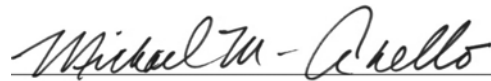
20 4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which
21 relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and § 1915A(b). However,
22 Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" in
23 which to file a First Amended Complaint which cures all the deficiencies of pleading
24 noted above. Plaintiff's Amended Complaint must be complete in itself without
25 reference to the superseded pleading. See S.D. Cal. Civ. L. R. 15.1. Defendants not
26 named and all claims not re-alleged in the Amended Complaint will be deemed to have
27 been waived. See *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if
28 Plaintiff's Amended Complaint fails to state a claim upon which relief may be granted,

1 it may be dismissed without further leave to amend and may hereafter be counted as
2 a “strike” under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th
3 Cir. 1996).

4 5. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

5 **IT IS SO ORDERED.**

6 DATED: July 9, 2013

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8 Hon. Michael M. Anello
9 United States District Judge
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